Despite the undoubted advantages of a federal system of government, it is liable to have certain inherent defects. Two of these are rigidity and inelasticity in the division of powers between the central and provincial (or state) authorities, and lack of means of co-operation between autonomous governments in matters of common interest. In this section we make certain suggestions which we think, if implemented, would largely overcome these defects in the Canadian federal system. We think that thereby national unity and efficiency of government would be promoted without in any way impairing the autonomy of the provinces.

1. Dominion-Provincial Conferences

The basic principle of a federal system of government is the division of powers between central and local authorities. In a relatively simple society where the functions of government are few and simple, such as at the time of federation, this division of power may not be a hindrance to efficiency and economy in government. But in the highly interdependent and complex society of today, with the great expansion of governmental functions which has become necessary, efficiency and economy in government cannot be obtained merely by a division of powers between governments. Co-operation in the pursuit of common objects and in the solution of common problems is no less essential. But co-operation between autonomous governments is difficult to achieve. Administrative authorities responsible to different legislatures are not always interested in co-operation; indeed, non-co-operation may on occasion better serve their immediate interests. Autonomous governments may thus tend to become rival centres of power rather than agencies for the co-operative pursuit of the public weal. This has too often been the case in the Canadian as in other federal systems. It is imperative that means be found for overcoming this tendency and for promoting co-operation between the provinces and between the Dominion and the provinces which is so essential to efficiency and economy in administration under modern conditions.

There have been attempts going back over fifty years to meet this deficiency in our federal system by occasional conferences, interprovincial or Dominion-provincial in character, called for the consideration of matters upon which common action was thought desirable. This expedient was first resorted to by the provinces in 1887 when an interprovincial conference met in Quebec at the instance of the Quebec Government, with five of the seven provinces represented. The Dominion Government, though invited, sent no representatives to this conference. The conference occupied itself exclusively with Dominion-provincial relations, seeking extensive modifications in the constitution and asking for a new schedule providing increased subsidies for the provinces. The purpose of the conference, it was declared, was to improve relations between the federal and provincial governments.

Fifteen years passed before another conference was called; again it was an interprovincial conference, which was held in Ottawa at the instance of the Government of Quebec, as before. This conference limited its consideration to the question of subsidies; it revised the proposals of the 1887 conference and submitted its results to the Dominion Government which, though taking no part, was favourable to the holding of the conference, according to a statement made to the conference by the Premier of Quebec.

The first Dominion-provincial conference was convened by the Prime Minister of Canada in 1906. It adopted in substance the recommendations of the interprovincial conference of 1902 which were

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1 See Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, pp. 7-10.

2 The term “interprovincial conference” is used to mean those conferences between provincial representatives in which the Dominion Government either did not participate at all or did so only upon invitation.

3 The term “Dominion-provincial conference” is used to mean those conferences summoned by the Dominion Government or in which that Government took an active part.

4 The unrepresented provinces were Prince Edward Island and British Columbia.

5 “The government which has taken the initiative in connection with this conference deems it its duty to declare at once that the conference must not be considered in the light of a possible move against the Federal authorities but that its sole object is to endeavour to solve, in the general interest of the whole of Canada, such difficulties as experience has shown to exist in the relations between the general and provincial governments.” (Statement by the Premier of Quebec at the opening of the conference.)
made effective by Dominion and Imperial legislation. With this as a precedent the Dominion Government has in the intervening years called the provincial governments into conference with it on seven occasions: in 1910, to consider the question of company law; in 1918, to discuss a wide range of questions: the return of their natural resources to the Prairie Provinces, applications by other provinces for increased subsidies, taxation, unemployment, housing and other problems arising at the close of the War; in 1927, to deal with an agenda covering many questions in which the Dominion and the provinces were jointly interested; in April 1931, for the purpose (as set out in the letter calling the conference from the Prime Minister of Canada to the Premiers of the Provinces), “of affording the provinces an opportunity of presenting any views they might desire to express with reference to the changes that are involved in the proposed statute of Westminster”; in 1933, to consider the question of road and rail transport; in 1934 to deal with unemployment relief and kindred questions, and company law.

The most elaborately organized of the Dominion-provincial conferences was the last one held, that of December, 1935.6 The whole field of Dominion-provincial relations in which there was uncertainty and friction was included in the agenda; all nine provinces were represented; the delegations were almost identical with the personnel of each government; and each government was attended by its senior administrative officials. The agenda included seven questions: (1) relating to the procedure that should be followed in amending the British North America Act; (2) relating to the financial relations between provinces and Dominion; (3) relating to unemployment and relief; (4) relating to responsibility for and co-ordination of social services; (5) relating to mining development and taxation; (6) relating to agriculture and marketing; (7) relating to tourist traffic development. All these questions were referred to special committees which made reports to a plenary session of the conference.

During this period of thirty-three years representatives of the provinces met in conference upon several occasions to consider matters of special concern to them: in 1910, an abortive meeting to consider the attitude of the other provinces toward the proposal that the representation in Parliament of the Maritime Provinces should be irreducible notwithstanding population changes; in 1913, for consideration (again inconclusive) of the question of Maritime representation, enlarged subsidies, and minor matters; in 1926, eight provincial governments met in conference to consider questions of double taxation, jurisdiction in insurance matters, and special relief for provinces where prosperity lagged.7

It will thus be seen that within a period of twenty-nine years there were eleven conferences, including both types, while in the period from 1926 to 1936 there were six, or roughly one for every year and a half. The range and scope of the questions discussed, as briefly indicated in this summary, make it quite clear that all the governments in Canada have recognized the need for conferences of this character and have admitted their usefulness in clarifying issues about which there is a conflict of interest or opinion.

The Government of Nova Scotia in its submission to the Commission made the definite proposal that these conferences should become an essential part of the Canadian federal system. Its recommendation was in these terms:—

“That provision ought to be made, by way of amendment to the British North America Act or otherwise, for annual conferences to be held at a fixed time between representatives of the Provinces and representatives of the Dominion.”

In the Province’s printed submission and in oral argument by Premier A. L. Macdonald, this proposal was explained and elaborated. “The conferences” it was stated in the brief “have proved to be very valuable and have produced results beneficial not only to the provinces but to the Dominion as a whole”, despite the fact that in the past conferences have been called, often on short notice, at times when it was inconvenient for one or more province to attend and with no preliminary consideration of the agenda.

The criticisms of Nova Scotia regarding the sporadic character of the conferences, the lack of careful preparation by the government making itself responsible for the meeting, the shortness of notice to the participants, the briefness of the time allotted for consideration of the questions submitted, appear to be justified by such examination into the history of these gatherings as has been possible.

The Government of Nova Scotia made certain concrete proposals for improving the conferences. Much more, it was contended, could be accomplished if provision were made, either in the British


7 The information given in the preceding paragraphs was compiled by the research staff of the Commission from departmental records and press reports. The official records of many of the earlier conferences are very incomplete; and for the inter-provincial conference of 1926 held in Ottawa no record is available beyond the contemporary reports in the press.
North America, Act, or by hold a conference each year at a fixed time. All governments could plan in advance to attend, and a small permanent secretariat could collect statistical and other data, compile the agenda and otherwise ensure continuity between conferences. Two points were emphasized in the argument by Nova Scotia. It was said, first, that such a scheme for regular conferences would allow not only formal discussion of difficulties that had arisen either between the Dominion and a province, or between one province and another. The conference, it was said, would be “an informal round table where the problems or the difficulties of any province could be brought out and aired informally.” Trade regulation and similar practices by provinces, considered unfair by other provinces, could be discussed. The conference would supply an “opportunity for discussion and for creating a spirit and an attitude of co-operation among the provinces and the Dominion, and a willingness based upon sympathy and understanding, on the part of one section of the Dominion to assist in so far as possible in correcting the difficulties of another section.” In the second place it was argued that “attendance should not be made to depend upon whether the provinces have particular issues to bring before the conference, but should be regular and as a matter of course.”

The proposal for annual conferences made by Nova Scotia was supported, with minor qualifications, by the Governments of Prince Edward Island and New Brunswick. The advantages of having permanent and continuous conference machinery were also stressed in several briefs by private organizations. Apart from the suggestion by the Premier of British Columbia that annual conferences were, perhaps, too frequent (but he made plain his willingness to consent if the other provinces wished to have a conference each year), no objection to the proposal was made in any of our public hearings.

These proposals of Nova Scotia appear to correspond with the views of the Dominion Government. In opening the conference of 1935, Prime Minister W. L. Mackenzie King said:

“At the present conference we can examine the basic principles underlying the [Dominion-provincial] questions, and provide machinery for their continued study and treatment. In this manner, their final, satisfactory disposition can be ensured at subsequent conferences.

This arrangement of continuity and permanence is necessary, because co-operation between the Dominion and the provinces is too vital a matter to be left entirely for intermittent conferences and to correspondence between governments.

Our secretarial arrangement and our proposed organization are based upon this desire—to have permanence and continuity.”

Some kind of organization for regular, instead of intermittent, conferences was here clearly suggested—a suggestion to which effect has not yet been given.

The need for such regular conferences to promote co-operation between Dominion and provincial governments is obvious. The complexities of our social, political and commercial organization have now reached a point where the earlier view, once widely held, that all Dominion-provincial difficulties arising from disputes over jurisdiction could be settled by a strict demarcation of powers and responsibilities must be finally abandoned. A clear demarcation of legal power is still theoretically possible, but the functions of government in the modern state cannot be divided sharply between central and local authorities as can legislative power. Many functions inherently unitary in character are in fact divided between the Dominion and the provinces by the present division of legislative power. Public health, the regulation of marketing, the control of business, are conspicuous examples. In such matters there will inevitably be gaps and inefficiency in governmental control without at least a measure of co-operation and uniformity of method between different governments. This intermeshing of duties, powers and responsibilities between the Dominion and the provinces demands sympathetic, constant and efficient co-operation between these governments. Moreover, it is in the interests of the provinces themselves that efficient methods of co-operation be devised. The tendency in most federal states has been toward centralization at the expense of the provinces (or states). In so far as matters requiring uniformity of treatment, or concerted action can be dealt with by co-operation among the provinces, or between the Dominion and the provinces, the case for additional centralization to promote efficiency or uniformity will not arise.
Mr. King, in the speech to the conference from which we have already quoted, is explicit in his avowal of this need of co-operation.\(^\text{13}\)

The Commission, in the light of these facts, is of the opinion that Dominion-provincial conferences at regular intervals with a permanent secretariat, as suggested, would conduce to the more efficient working of the federal system. It, therefore, recommends the adoption of the proposal submitted by the Government of Nova Scotia.

The cost of providing the secretariat should be borne by the Dominion Government and provision should be made for an adequate staff to collect information on Dominion-provincial relations and make it available to all governments. If our recommendation for the creation of a Dominion-Provincial Finance Commission is adopted, the secretariat which will be required might well be also employed as the secretariat of Dominion-provincial conferences as its work will be wholly in the field of Dominion-provincial relations. Or, as an alternative, the secretariat might be provided by the Department of the Secretary of State. Under the supervision of such a secretariat full records of Dominion-provincial conferences could be kept. A technique of procedure at such conferences could be evolved to afford opportunity for full consideration of matters which might otherwise produce friction or lack of harmony either between the Dominion and one or more provinces, or between two provinces, as well as to promote co-operation on matters of common interest. To suit the convenience of all governments concerned, provided it was clearly understood that no great delay should intervene between conferences, a certain latitude could be allowed in arranging the time when a conference should be held.

In recent years the practice has developed of holding frequent conferences of administrative officials in similar departments of Dominion and provincial governments. The work of the Dominion Council of Health and of the special inter-governmental committee on uniformity of company law may be cited as examples of the value of this type of conference. We suggest that special co-operative activities of this kind should be continued and related to the work of the general Dominion-provincial conferences. Such conferences of administrative officials on particular problems might well be held either at the same time as, or immediately before or after, the general conference.

If provision is made for adequate machinery for Dominion-provincial conferences it will, in the judgment of the Commission, supply a serious lack in the Canadian federal system. In the past the spirit of open diplomacy has sometimes been lacking in the relations between the Dominion and the provinces. In the result it has happened that a province suffering from some peculiar disability or having some special claim on the Dominion has been able to conclude a bi-lateral agreement with the Dominion which aroused the envy or resentment of other provinces. It is desirable, except in very special circumstances, that arrangements between the Dominion and a province should be open for discussion at a conference where all the provinces have the opportunity of being represented. Such conferences might also be used to facilitate arrangements between two or more individual provinces.

Another suggestion of machinery for closer co-operation between the Dominion and the provinces was made by New Brunswick\(^\text{14}\) which advocated the establishment of a Department of Secretary of State for the Provinces at Ottawa and a Department of Federal Relations in each province. Immediately after Confederation a member of the Dominion cabinet held the portfolio of Secretary of State for the Provinces. In 1873\(^\text{15}\) this Department was abolished because of insufficient work to justify a separate department, and its functions transferred to the Department of the Secretary of State.

The suggestion of the New Brunswick Government contemplated the use of new departments for the conduct of inter-governmental communications.\(^\text{16}\) At the present time, except in formal matters, a department of a provincial government usually communicates directly with the department of the Federal Government which is concerned with the matter under discussion, without any record being kept in any central office in either the provincial or Dominion governments. In formal matters, the Dominion Secretary of State communicates on behalf of the Federal Government with the Lieutenant-Governor of the province. There may be certain disadvantages in not having a single department in each government charged with the

\(^{13}\) Where demarcation was not possible Mr. King said that "a formula for co-operation between the Dominion and the provinces" should be sought. Speaking on the need for co-operation Mr. King said: "we should not lose sight of the fact that governments are only institutions created by men to serve human needs. After all, the citizens of the provinces are the citizens of the Dominion. The individuals whose interests the provinces seek to serve are the same individuals for whom the Dominion is concerned." (Ibid, p. 9.)

\(^{14}\) Ex. 357, pp. 7-8.

\(^{15}\) Statutes of Canada, (1873) 26 Vict., c. 4.

\(^{16}\) Ev. pp. 8546-47.
responsibility for inter-governmental communications. Each province must, of course, decide for itself the expediency of establishing such a department, but the Commission is inclined to think that the delay and inconvenience of having the voluminous correspondence, which is today necessary between governments, conducted by one department would make the suggested innovation undesirable. The existing machinery of communication appears to have developed along satisfactory lines but there is obviously room for improvement. Complaints are voiced from time to time by some of the provinces about the difficulty of getting information in the form most suitable to their uses, as for example, statistics. We think that the establishment of a permanent secretariat for Dominion-provincial conferences could be highly useful in meeting this need since it could serve as a bureau of information to all the provinces.

2. DELEGATION OF POWERS

One of the difficulties inherent in any federal system is the rigidity which marks the division of jurisdiction between the central and local governments. For obvious reasons constitutional amendments in a federal state are made more difficult than is usual in unitary states.

Under our terms of reference we do not feel called upon to make any recommendations as to methods by which the British North America Act should be amended. Our instructions obviously contemplated the suitability of a reallocation of powers which would require constitutional amendments, and we are reporting as to what in our opinion will "conduce to a more efficient, independent and economical discharge of governmental responsibilities in Canada". Where necessary or desirable in the light of our investigations, we have recommended that changes in the British North America Act should be made, our only restriction being the duty to respect a "distribution of legislative powers essential to a proper carrying out of the federal system". While we have recommended that constitutional changes should be made, we feel that it should be left to the Dominion and the provinces to work out the method whereby acceptable changes should be brought about. We desire merely to emphasize the necessity that some procedure for constitutional change should be evolved.

We think that the introduction of a measure of flexibility in the Canadian federal system should be considered. A number of provinces may on occasion be willing and may even actively desire the Dominion to assume responsibility for a function which is beyond its constitutional powers. The Dominion may itself be willing to assume the function but be unable to do so until public opinion has developed to the extent of permitting a constitutional amendment to be made. On the other hand, the Dominion may be alone entitled to perform functions which, under modern conditions, it may be more appropriate for the provinces to perform and certain of the provinces may be anxious to assume such responsibility. In several submissions to us, it was suggested that it would be desirable to allow a province to delegate power over a subject to the Dominion, provided that the Dominion was willing to accept the delegation, and conversely that there might be delegation of power by the Dominion to a province. The effect of such delegation would be that the delegating authority would divest itself, at least for a limited period, of the power as completely as if it had been assigned to the other authority in the British North America Act.

At the present time, although the law is not entirely clear, it seems that delegation of legislative power either by the Dominion to a province, or by a province to the Dominion is invalid. To establish definitely a power of delegation which is sufficiently wide, amendment of the British North America Act would be required. Such an amendment should cover both the power to delegate jurisdiction and the power to receive jurisdiction by delegation. Such a power of delegation should apply to the whole field of legislative power for both the province and the Dominion including any legislative power received by way of amendment or delegation. It should also be provided that the act of delegation would only be operative if the legislative unit to which delegation was made signified its willingness to accept it. Provision should also be made permitting delegation to be either in perpetuity or for a definite time limit. The Dominion, for example, might be unwilling to accept the delegation of certain functions involving extensive organization (such as non-contributory old age pensions) unless it were assured that the delegation would operate in perpetuity. For other functions (such as the grading of natural products) it might be sufficient if there were assurance that

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17 Ex. 140, Brief of N.S., pp. 22-24; Ex. 34, Brief of Sask., p. 335; Ex. 292, Brief of Canadian Chamber of Agriculture.
18 Canadian Pacific Railway Co. v. Notre Dame de Bonsecours [1892], A.C. 367; Rees v. Zaslavsky [1935], 3 D.L.R. 788; Rees v. Thorby Traders [1936], 1 D.L.R. 502; Rees v. Brodsky [1936], 1 D.L.R. 578. Delegation should be distinguished from legislation by reference and conditional legislation, both of which may be constitutionally valid. See Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction, p. 37 ff.
the delegation would not be revoked for a stipulated period of ten or fifteen years. It should also be provided that although an agreement of delegation could not be revoked by the unilateral action of either legislature during the life-time of the agreement, it might be terminated earlier with the consent of both parties expressed by appropriate legislation.

Subject to such restrictions, we can see no reason why a mutual power of delegation between the Dominion and a province should not be permitted on a temporary as well as a permanent basis. It was suggested to us that the failure of attempts which have been made to introduce an element of flexibility into federal constitutions has been largely due to the fact that changes were required to be permanent. It was said that there should be provision for temporary delegation of functions wherever such a device could be appropriately applied. In the British North America Act provision for change in the respective jurisdictions of the Dominion and the provinces appears in section 94. The Dominion was given power to make provision for uniformity of laws relating to property and civil rights in the three common law provinces, but any federal act designed to do this required adoption by the legislature of a province before it had any operative effect in such province. When the act had been thus adopted the Dominion acquired full legislative power in perpetuity to deal with its subject matter. It is conceivable that the irrevocable consequences of action under section 94 prevented it from ever being used. Moreover, there is considerable doubt whether the section applies to provinces other than Ontario, Nova Scotia and New Brunswick, and there is no provision for transfer of jurisdiction from the Dominion to a province if such should be desired.

Elsewhere in this Report in dealing with certain specific problems of Dominion-provincial relations we have suggested that these problems might be solved in each instance by delegation of jurisdiction. We think that a general power of delegation such as we have discussed, which would allow the transfer of jurisdiction from the Dominion to a province, or from a province to the Dominion subject to the conditions mentioned, would cover all these instances, as well as others. With such a power desirable changes in the constitutional allocation of powers could be effected in respect of one province without the necessity of waiting for such a development of public opinion as would permit of a nation-wide constitutional amendment. A change in jurisdiction might be effected on a temporary basis for one province, which, if it proved successful, might induce other provinces to make similar arrangements, and if unsuccessful need not be a permanent arrangement as would be a constitutional amendment.

The power of delegation would also permit of minor changes in the allocation of functions between the Dominion and certain provinces to suit the peculiar conditions of these provinces. In a federation such as Canada where some provinces are much larger and financially much stronger than others this may be highly desirable. As we have pointed out in the chapter on overlapping services, the Dominion has already been driven to perform certain services for the smaller provinces which the larger provinces do not need. A general power of delegation would facilitate arrangements of this sort in keeping with the nature of the Canadian economy and the unequal size and strength of Canadian provinces. In short, a general power of delegation for both the Dominion and the provinces should provide a measure of flexibility which is much needed in our federal system.

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19 Ex. 140, Brief of N.S., p. 23.
20 See p. 3975 (Attorney-General, J. H. MacQuarrie of N.S. re sect. 94 of the B.N.A. Act): "It is suggested that the reason the section has not been used may be found in the words 'and from and after the passing of any Act in that, Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in such Act shall, notwithstanding anything in this Act, be unrestricted'; and because no provision was made by which the Dominion could get back a subject of legislation that under this section had been given to the Dominion. From which it would appear that once the Dominion were permitted under this section to encroach upon a provincial field, the matter dealt with would become exclusively and for all time one for the Dominion."

21 See, however, the opinion of Mr. F. R. Scott, Ev. p. 2781.

22 In the Australian constitution the Commonwealth Parliament was given jurisdiction to make laws with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law." (Commonwealth of Australia Constitution Act, Section 51.) (See also Section 105A.) This section has never received any application in Australia but it was suggested to us that if it had been more restricted and had provided for reference of legislation under defined conditions, it would have received considerable use. See Ex. 140, Brief of N.S., p. 23.

23 See especially p. 59 re fisheries, p. 56 re marketing, p. 32 re old age pensions.

24 See Sect. A, Chapt. II.